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IN THE

Supreme Court of the United States

October Term, 1966

No. 447

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

FRANCIS ROBILLARD, LEROY SNOWDEN and JOHN WRENN,

Petitioners.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This is a petition for writ of certiorari to the Appellate Term of the Supreme Court of the State of New York, First Department, to review a decision of that court, entered May 6, 1966, affirming without opinion, a judgment rendered after a trial by the Criminal Court of the City of New York, County of New York, on July 29, 1965, convicting the petitioners of disorderly conduct [N. Y. Penal Law, §722, subdivision 8]. Petitioners were each sentenced to serve thirty days in the Workhouse; execution of sentence was suspended as to Robillard and Snowden. On May 18, 1966, petitioners were denied leave to appeal to the Court of Appeals of the State of New York (FULD, J.).

The Statute Involved

The relevant portions of Section 722 of the Penal Law provide:

> "Disorderly Conduct.
>
> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> * * *
>
> "8. Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;"

Questions Presented

1. Does mootness command the dismissal of the petition as to Robillard and Snowden?
2. Does the sufficiency of the People's proof in this case present a federal question?
3. Does due process require recognition of the defense of entrapment, and if so, does the police conduct in the present case constitute entrapment?

Summary of Argument

1. The certiorari application of Robillard and Snowden is moot and should therefore be dismissed.
2. Sufficiency of evidence to support a state conviction constitutes a federal question only where there is no evidence whatsoever to support an essential element of the

crime. In this case the People proved every element of the crime. The conviction then fully accords with due process.

3. Petitioners' claim of entrapment presents no foderal question because that defense lacks Constitutional dimension. In any case, even if constitutionally mandated, the police conduct in the present case clearly did not constitute entrapment.

THE EVIDENCE

The People's Case

Patrolman **Anthony De Greise** testified that at about 1:50 a.m. on May 23, 1965, he entered a "very crowded" bar and grill, located at 513 Greenwich Street, City and County of New York (9, 17.)* After ordering a bottle of beer, he sat down on a bench, several feet from a pool table where the three defendants stood (9). As he sat there, drinking his beer, the officer, in plain clothes, was approached by the defendant Robillard who asked him for a cigarette light (9, 11). De Greise rose and lit the cigarette whereupon Robillard introduced him to the other two defendants (9).

Asked by Robillard whether he frequented "this type of bar" the officer stated that he did (10). Wrenn then suggested that De Greise go to a party with them and he assented (10). At this point, about five minutes after he had met the defendants, Robillard said to him, "I think

* References, unless otherwise indicated, are to the typewritten minutes of the trial.

your joint is big enough to fuck me in the ass," and, proceeding to rub his hand on De Greise's thigh, Robillard stated that he "came" three times a night (10, 16). Then Wrenn stated, "I think I would like to beat [him] on the ass and boy would I make his ass red" (10). Pressing his knees against the officer's, Wrenn added, "I will come all over you" (10). "When I have you," asserted Snowden, "I just want to suck and fuck. I don't go for that beat shit" (10).

Urging the group to leave, Robillard said, "Let's go and I will watch you girls suck and fuck; man I'll beat your ass with a strap" (10-11). At this time all four of them left the bar and proceeded to De Greise's car where he identified himself and placed defendants under arrest (11).

The Defense

Francis Robillard and **Leroy Snowden** testified that several minutes after defendants had entered the bar in question, Patrolman De Greise approached Robillard and asked him for a cigarette light (23). De Greise stated he had just come from another bar where he had not seen anyone that looked good to him (23). After engaging defendants in conversation about various bars, he invited them to his apartment for a drink (23, 34). Robillard replied that he was so tired that he was going home shortly (23). De Greise renewed his invitation several times and finally, Wrenn said that he would go if Robillard came (23, 34). The officer persisted, until Robillard assented (24). All four left the bar (24, 45).

Outside, De Greise insisted that they use his car, stating "We'll only be a few minutes and I will drive you right back to your car" (24, 34). Assenting, the defendants began walking to De Greise's car when suddenly they were placed under arrest.

POINT I

The petition should be dismissed as to petitioners Robillard and Snowden.

In *St. Pierre* v. *United States*, 319 U. S. 41, 42-3 (1943), this Court, in dismissing a certiorari petition, held:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it (cits. om.). The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the terms of imprisonment which he has served. Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied."

Under the criteria of *St. Pierre*, the petition is moot as to two petitioners, Robillard and Snowden. In September, 1965 they were sentenced to serve thirty days in the Workhouse, execution of which was suspended. For the next six months, the maximum time for which petitioners could have been sentenced [New York Penal Law §723], the sentencing court could have revoked the suspended sentence and imposed a prison sentence [New York Code of Crim. Proc. §470-a]. Now, the six months having run

and the sentencing court thus having no power over petitioners Robillard and Snowden, their petition is moot unless they show legal "disabilities" flowing from the judgment [*St. Pierre,* supra at 43; see *Fiswick et al.* v. *United States,* 329 U. S. 211, 222 (1946)]. Petitioners allege no such disabilities nor could they, for neither New York nor federal law imposes any further penalty upon conviction of the offense in question. Clearly then, Robillard's and Snowden's petition is moot and should therefore be dismissed.

POINT II

The petition does not present a substantial federal question.

a. The People introduced evidence on all elements of the crime.

Straining to propel the non-federal question of sufficiency of evidence into a federal question, petitioners contend that the People introduced no evidence whatsoever on an essential element of the crime, and this deficiency constitutes a denial of due process under *Thompson* v. *Louisville,* 362 U. S. 199 (1960). This Court has always regarded quantum of proof as a state issue, devoid of any federal question. Slightly limiting that well-established rule, the Court, in *Thompson* v. *Louisville,* 362 U. S. 199 (1960), held that a conviction totally lacking evidence—a situation that the Court considered rare—violates due process. However, the present case is clearly not one of those rare instances warranting an excursion into the state's ruling on quantum of proof, for the People introduced evi-

dence on all elements of the crime. Petitioners' unfounded contention rests on their complete failure to comprehend the statute in question.

The offense of disorderly conduct under Section 722 of the New York Penal Law has two essential elements of proof: (1) that defendant committed an act falling within one of twelve subdivisions of the statute; (2) that defendant acted "with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned." Acknowledging the People's proof of the first element—that petitioners solicited another to commit a crime against nature [Subdivision 8], they direct their allegation of lack of proof to the second element.

The nature of the proof necessary to satisfy the disputed element of the statute has been well-defined by the highest court of New York. In determining whether there is evidence to support a state conviction, this Court, of course, is bound by the state's own interpretation of the statute in question [*Garner* v. *Louisiana*, 368 U. S. 157, 166 (1961)]. In *People* v. *Monnier*, 280 N. Y. 77 (1939), the New York Court of Appeals construed an act "whereby a breach of the peace may be occasioned" to mean that breach of the peace "might reasonably be expected * * * to flow from such conduct." Elaborating on this objective, rather than subjective nature of the conduct proscribed by the statute, the Court of Appeals, in *People* v. *Harvey*, 307 N. Y. 588 (1954), stated:

> "Common sense * * * dictate[s] that language or conduct is to be adjudged to be disorderly, not merely because it offends some supersensitive or hypocritical individual, but because it is, by its nature, of a sort

> that is a substantial interference with (our old friend) the reasonable man."

Thus, the disturbance potential of conduct in question clearly is not to be determined from the standpoint of the particular complainant—whether private citizen or police officer—but by the norm of the "reasonable man."

This construction fully accords with the New Hampshire Supreme Court's interpretation of that state's breach of the peace statute, which so defined, was unanimously upheld by this Court as a valid exercise of the police power [*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 573 (1942)]. The New Hampshire high court had held that the test of whether words tended to breach the peace:

> "'is not to be defined in terms of what a particular addressee thinks * * * The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight'" (*id.* at 573)

And, no less true in the present case than in *Chaplinsky* is the fact, noted by the Court there, quoting approvingly the New Hampshire Supreme Court's opinion:

> "'The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. * * * Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. * * * The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, of peace by the speaker—including "classical fighting words," words in current use less "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats'" [*id.* at 573].

The words deemed "plainly likely to cause a breach of the peace by the addressee" in *Chaplinsky* were defendant's assertion to complainant that he was "a God damned racketeer" and "a damned Fascist" [*id.* at 569]. Surely, as likely to stir the "reasonable man" [*People* v. *Harvey, supra* at 593], possessed, as he is, of "common intelligence" [*Chaplinsky, supra* at 573], to disturb the peace was petitioners' concerted effort to solicit him for the purpose of committing a homosexual act. Public solicitation, degrading the addressee and implying, as it does, that the addressee is a pervert, constitutes no less than "fighting words." And even more likely is a breach of the peace where, as here, the addressee is solicited not merely for a homosexual act, but for a grotesque sado-masochist orgy, clearly recognizable "'by the insult it offers, invariably, to sex, and the human spirit'" [*Mishkin* v. *New York,* 383 N. Y. 503, 506, n. 4 (1966), (quoting D. H. Lawrence, *Pornography and Obscenity* [1930])].

Of course, under the rule of *Thompson* v. *Louisville, supra,* the question here is not the sufficiency, but merely the existence of evidence as to the likelihood of breach of the peace resulting from petitioners' conduct. To contend, as do petitioners, that their perverse behavior was utterly devoid of likelihood to cause a breach of the peace is unrealistic and conflicts with this Court's considered view that utterance of certain words may reasonably be expected to cause a disturbance.

b. No constitutional question is raised by petitioners' claim of police entrapment

This Court has never accorded Constitutional status to the defense of entrapment. As petitioners acknowledge, the rules postulated in *Sorrells* v. *United States*, 287 U. S. 435 (1930) and *Sherman* v. *United States*, 356 U. S. 369 (1958), the two leading decisions on entrapment, were exercises of the Court's supervisory jurisdiction over the administration of criminal justice in the federal courts [*Sorrells, supra* at 450-51; *Sherman, supra* at 380-81 (concurring opinion, Frankfurter, J.); see *Banks* v. *United States*, 258 F. 2d 318 (9th Cir.), *cert. denied* 358 U. S. 886 (1958)]. Thus, since petitioners' claim of entrapment clearly lacks constitutional dimension, it is inadequate basis for granting the writ of certiorari [28 U. S. C. §1257 (3)].

Lacking constitutional mandate, the defense of entrapment has not been recognized by the New York courts.* It should be noted in passing, however, that should facts showing police conduct as egregious as that condemned in *Sorrells* and *Sherman* come before the New York courts, in all likelihood a conviction would be barred, perhaps on grounds of failure of proof of *mens rea*.

However, so remote from the opprobious police behavior condemned in *Sorrells* and *Sherman* is the police activity in the present case, that even if the stringent tests

* It does, however, become an affirmative defense in New York under the Revised Penal Law, Section 35.40, enacted by L. 1965, ch. 1030, eff. September 1, 1967.

promulgated in those supervisory decisions were applied here, the defense would be indisputably unwarranted.

Defining the permissible scope of police activity, the Court, in *Sherman,* stated that "Criminal activity is such that stealth and strategy are necessary weapons in the arsenel of the police officer" [*id.* at 372]. And, in *Sorrells,* the Court said that if government agents "merely afford opportunities or facilities for the commission of the offense," the prosecution is not defeated [*Sorrells, supra* at 441]. The defense is available only when "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they might prosecute" [*Sorrells, supra* at 442].

However, the "inducement" permitting the defense of entrapment must be more than mere suggestion or invitation to commit a crime [*Sorrells, supra* at 441, 452; see *United States* v. *Place,* 263 F. 2d 627 (2 Cir. 1959); *Shaw* v. *United States,* 151 F. 2d 967 (6 Cir. 1945); Note, *Entrapment,* 73 Harv. L. Rev. 1333, 1336 (1960)]. As the Court succinctly stated in *Sorrells,* the defense must show that "The agent *lured* defendant, otherwise innocent, to its commission [the crime] by *repeated* and *persistent solicitation*" [*Sorrells, supra* at 441 (emphasis added)].

Furthermore, even if the defendant establishes "inducement," the government may overcome the defense of entrapment by proving defendant's "predisposition" to commit the crime [*Sorrells, supra* at 451; see *United States* v.

Becker, 62 F. 2d 1007, 1008 (2d Cir. 1933) (L. Hand, J.)]. A defendant's "ready complaisance" to commit the crime evinces such predisposition [*Sherman, supra* at 375; *United States* v. *Becker, supra* at 1008].

Wholly absent in the present case is the "persistent and repeated solicitation" present in *Sorrells* and *Sherman*. Petitioners, the "instigators" [*Sorrells, supra* at 452] of the illicit act from the outset, initiated contact with the arresting officer when Robillard walked over to him in a "very crowded" bar, asked for a cigarette light, and then introduced him to his companions Snowden and Wrenn (9, 17). Then, after an innocuous five minute conversation devoid of any conversation concerning sex, all three petitioners sought to engage the officer as the subject of a sado-masochistic orgy (10). Rapidly working to secure his acquiescence, they accompanied boasts of their prowess in performing acts of perversion with physical advances on the officer (10). Thus, petitioners' criminal conduct, far from "the product of the creative activity" of the police [*Sorrells, supra* at 451], was clearly self-induced, and the officer, garbed in plainclothes, "merely afforded the opportunity" for petitioners' commission of a criminal act [*Sorrells, supra* at 441].

Moreover, even assuming, incorrectly, that the officer's conduct did induce petitioners to commit the crime, nevertheless, the defense of entrapment was overcome by the "ready complaisance" they manifested. Only five minutes after they first met the officer, petitioners solicited this stranger for a homosexual act. In sharp contrast is the defendants' stout resistance to government inducement in

Sorrells and *Sherman;* that resistance, the Court held in those cases, rebutted the prosecutions' claim of defendants' readiness to commit the crimes in question. In the former case, defendant consented to illegally sell liquor to a government agent—an old war friend—only after one hour of persistent requests made by the agent during the course of a social visit to defendant. Similarly in *Sherman,* a government agent whom defendant believed to be a fellow narcotics-withdrawal patient, for several months implored defendant to sell him narcotics before he finally succumbed and committed the illicit act. In the instant case, however, far too soon and too spontaneous were the petitioners' alleged seducement to merit acquittal as "unwary innocent[s]" [see *Sherman, supra* at 372].

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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